GRENADA

IN THE COURT OF APPEAL

MAGISTERIAL CRIMINAL APPEAL NO.6 OF 2003

BETWEEN:

[1] CHANDERBALLI MAHABIR
[2] WILLAND MITCHELL

Appellants

and

COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC — Justice of Appeal
The Hon. Mr. Michael Gordon, Q.C. — Justice of Appeal [Ag.]
The Hon. Mr. Othniel Sylvester, Q.C. — Justice of Appeal [Ag.]

Appearances:

Mr. Peter David for the Appellant
Mr. Christopher Nelson, Director of Public Prosecutions for the Respondent

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2003: December 1;
2004: April 26.

JUDGMENT

[1] ALLEYNE, J.A.: This is an appeal against sentence on a conviction for possession of a controlled drug to wit cocaine contrary to section 6(2) of the Drug Abuse Prevention and Control Act of Grenada, following guilty pleas by both Appellants.

[2] The offence was committed on 15th July 2003, the complaint was laid on 21st July 2003, and the trial and sentence took place on 14th August 2003. The street value

of the drugs was E.C.$1 million. The Appellants pleaded guilty at the first opportunity.

[3] The facts of the case are that following police surveillance of the Appellants over a period of two days, Cpl. Smart observed both Appellants in a car travelling from Mont Toute towards St. Georges at about 6.45 p.m. on 15th July 2003. Cpl. Smart followed the Appellants, who stopped at Belmont where the Appellant Mahabir handed a black plastic bag to a third party, who in turn handed a black and white knapsack to the Appellant Mitchell, who placed the knapsack on the back seat of the car. The Appellants drove off towards Grand Anse, and were again followed by Cpl. Smart, who made contact with other police personnel. At a certain point in the Grand Anse area Cpl. Smart overtook the Appellants' car, and drove in front of it, blocking the road and preventing the Appellants continuing on their journey. Cpl. Smart approached the Appellants, identified himself, and questioned them concerning the contents of the knapsack, which was still on the back seat of the car. The Appellant Mitchell denied any knowledge, asserting that the Appellant Mahabir "go and collect his thing". Smart informed Mitchell that he had observed the entire transaction, whereupon Mitchell bowed his head, placed his hands on his head and said nothing further.

[4] Cpl. Smart opened the bag and observed a number of brick-like packages in it, which on later analysis were determined to be cocaine weighing 10 kilos. He arrested both Appellants on suspicion of possession of a controlled drug. He later took them to their home, where Mahabir instructed his girlfriend to hand to the officer the money that he had given her. She retrieved $1,500.00 from under a clothes basket, and handed it to Cpl. Smart. In a speaker box the police found US $30,000.00, US $80.00 and EC $482.00, which Mahabir informed Smart was the remainder of the money given him by a named individual "to continue the transaction."

[5] In Mitchell's apartment the police found in his valet US $320.00. This, together with the money found in Mahabir's apartment, was taken by the police. Both Appellants were taken to the police station, arrested and charged with possession of a controlled drug, the value of which has been given as $1 million.

[6] Neither Appellant has any previous conviction. Mahabir is 39 years old, married with two children age 12 and 13. He lives in Trinidad, and his occupation is salesman. Mitchell is 37, married with three children ages 3, 4 and 11 years. He is a sailor, and also lives in Trinidad. They both cooperated with the Police once the evidence was discovered. They have thrown themselves on the mercy of the Court.

[7] The Appellants were offered the option of an immediate fine, which they agreed to. The learned magistrate imposed fines of $250,000.00 against each Appellant, to be paid immediately, in default 3 years imprisonment, the money was ordered forfeited, except the sum of US $320.00 found in Mitchell's valet, in respect of which learned counsel for the Appellants requested a hearing. The prosecutor withdrew any claim for forfeiture of this amount, and no order was made. The Appellants have appealed against their sentences.

[8] The maximum penalty upon conviction on summary trial for an offence against section 6(2) of the Act is a fine of $250,000.00 or five years imprisonment or both. In her reasons for decision the learned magistrate referred to this maximum, and to the fact that both Appellants had said that they could pay an immediate fine. She said that taking into consideration that the defendants had no record of previous convictions, she imposed a fine of $250,000.00 to be paid immediately in default three years imprisonment. The learned magistrate gave no other reasons.

[9] This Court had recently to deal with a matter involving similar issues. In the case of Osbourne and Archibald v Commissioner of Police[1] I relied on the principles enunciated in Archbold Criminal Evidence, Pleading and Practice fortieth edition paragraph 675 I.4. and on the cases of R. v Ashmore[2] and R. v Thompson[3] in support of the proposition that once a Court has determined, having taken into account any mitigating features, that it can properly deal with an offender by fining him instead of imposing a term of imprisonment, the amount of the fine should be determined by the gravity of the offence and then reduced if necessary to a sum within the defendant's means.

[10] In the 2001 edition of Archbold, at page 675 paragraph 5-404, the learned author says that the Court of Appeal has on occasion criticized the imposition of a fine where the gravity of the offence is such that the only proper penalty is an immediate custodial sentence. The learned author points to the danger of allowing affluent offenders to escape custodial sentences by the payment of fines. On the other hand, in that and the following paragraphs emphasis is laid on the principles governing the amount of fines and the payment of fines by instalments. It is considered to be wrong in principle to impose a custodial sentence instead of a fine where the offender's means are such that it is unrealistic to expect him to pay a fine; R. v Reeves[4]. In that case, decided by the Court of Appeal (Criminal Division) in 1972, Roskill L.J. said in relation to what the learned Assistant Recorder said in passing sentence:

> That language must plainly have indicated to the appellant and indeed to anybody else in court who might be listening, that he was being sent to prison not because the offence itself merited a sentence of immediate custodial imprisonment but because he had not the financial wherewithal to pay a financial fine. That, let it be said at once, is of course completely wrong.

[1] Magisterial Criminal Appeal No. 40 of 2003, St. Vincent and the Grenadines
[2] [1974] Cr.LR 375
[3] [1974] Cr. LR 720
[4] 56 Cr. App. R. 366, C.A.; see also R. v Ball 3 Cr. App. R. (S) 283, (CA)

[11] It seems to me that the real effect of the sentence imposed by the learned magistrate in this case was to impose an immediate sentence of imprisonment of three years on each of the Appellants. The question which I ask myself is whether, on the facts of this case, the gravity of the offence was such that the only proper penalty was an immediate custodial sentence. I think that that is the case, and that the learned magistrate ought properly to have imposed immediate custodial sentences instead of imposing a fine which, by its magnitude and the condition of immediate payment, makes it apparent that the real intention was to impose a custodial sentence.

[12] By their own admission, the Appellants were engaging in this transaction for profit. They were handling a large quantity of cocaine, knowingly and without mitigating considerations. Mahabir had in his possession significant amounts of United States currency for the purpose of continuing to trade in prohibited drugs. This trade is not only extremely prevalent in our societies, but is known to be profoundly destructive of our social fabric and especially of the lives of our youth. The Parliament of Grenada has imposed severe penalties for persons convicted of offences of this nature, and expects the Courts to treat such offences with the severity that they deserve. It is apparent on the evidence that as between the two Appellants Mahabir was the directing force behind this operation and that Mitchell played a secondary, though not insignificant part.

[13] In imposing sentence I would take into account the previous unblemished records of these individuals, their early guilty pleas, their cooperation with the police once their offence had been discovered, but also on the other hand the seriousness of the offence, its social consequences and the fact that these Appellants came all the way from Trinidad to conduct what was obviously a commercial transaction.

[14] I would allow the appeal, discharge the sentences imposed by the learned magistrate and substitute therefor, in respect of the Appellant Chanderballi Mahabir a sentence of two years imprisonment, and in respect of the Appellant

Willand Mitchell a sentence of 18 months imprisonment, each to run with effect from the 15th August 2003, the date of trial and sentence.

Brian Alleyne, SC
Justice of Appeal

I concur.

Michael Gordon, Q.C.
Justice of Appeal [Ag.]

[Sgd.]

I concur.

Othniel Sylvester, Q.C.
Justice of Appeal [Ag.]